

### AMENDMENTS

Claims 1-20 are pending.

Claims 1, 3, and 7-10 have been amended.

Claims 11-20 have been added.

Support for the amendments is found in the claims and specification (page 6, line 9 through page 7, line 23; page 9 paragraph [0014]; paragraphs [0011], [0016], and [0020]), as originally filed. No new matter is believed to have been added.

### REMARKS AND REQUEST FOR RECONSIDERATION

The claimed vegetable and/or fruit drink composition comprises an insoluble substance (solids) derived from vegetables and/or fruits, an acidic polysaccharide water-soluble dietary fiber, and water (claim 1). The claimed drink also can comprise a neutral polysaccharide water-soluble dietary fiber (claim 2). The isolated substance (solids) has a size of 833  $\mu\text{m}$  or less and is contained in the vegetable drink (see page 6, line 9 through page 7, line 23, of the present specification describing filtered a homogenized sample through a 20-mesh, opening of the mesh of the sieve: 833  $\mu\text{m}$ , Tyler standard sieve, and the dry weight content of the insoluble substance (solids), also see paragraph [0023]).

A content of the insoluble substance is from 0.1 to 1.2 wt. %. When the content of the insoluble substance is higher, a viscosity and unpleasant odor caused by heat sterilization is increased (page 7). The claimed content of the insoluble substance enhances smooth drinking (pages 4-5 of the present specification). By adding the claimed dietary fiber and adjusting a insoluble substance content derived from vegetables and/or fruits within the claimed range, a grassy odor and a heated odor caused by heat sterilization is reduced and a savory taste is enhanced which facilitates smooth drinking (page 4 of the present specification).

Claims 1-10 are rejected under 35 U.S.C. 102(b) over Devine et al., US 5,234,704. The rejection is traversed because Devine et al. do not describe or suggest:

(1) the claimed insoluble substance having a size of 833  $\mu\text{m}$  or less and the claimed content of the insoluble substance (e.g., claims 1, 3, and 11);

(2) an acidic and a neutral polysaccharide water-soluble dietary fiber in a drink composition (e.g., claim 2);

(3) a vegetable drink (as in claims 17 and 20), and

(3) the claimed content of Component (B), Component (D) and the total content of Components (B) and (D) in a drink composition (e.g., claims 4-6 and 12-13).

Devine et al. do not anticipate the claimed drink because Devine et al. do not describe or suggest an insoluble substance contained in the vegetable drink and having a size of 833  $\mu\text{m}$  or less and the content of the insoluble substance of 0.1-1.2 wt.%.

Devine et al. describe a flavored edible composition (e.g., a beverage) comprising a fruit or vegetable juice concentrate (a liquid) and, optionally, chunks or purees (col. 5, line 48 to col. 6, line 26), an insoluble fiber, a hydrocolloid and water (col. 4, lines 35-68 and col. 7-8).

(1) Devine et al. do not describe that a solid is an *insoluble substance* contained in the vegetable drink and having a size of 833  $\mu\text{m}$  or less (i.e., solids passed through of a 20-mesh Tyler standard sieve). See pages 6-7 and 13 of the present specification describing filtering a homogenized sample and collecting the insoluble substance passed through 20-mesh filter as having a size of 833  $\mu\text{m}$  or less.

The Examiner has pointed to Table 1 of Devine et al. as describing 1% of a solid derived from apple concentrate. However, Table 1 describes using the following juice concentrate (i.e., liquid): 1% of the concentrated apple juice (1:6.5), which equals to 6.5% of pure apple juice; 4.4% of pure white grape juice (0.88% of white grape concentrate (1:5)); and 1.95% of pure pear juice (0.3% of pear concentrate (1:6.5)). Thus, the total content of the fruit juice in the composition of Table 1 is 12.85%.

The present specification discloses that if the content of the insoluble substance is higher than 1.2 wt.%, the beverage has inferior properties (see paragraph [0010], page 7).

There is no disclosure of the content of insoluble substances (solids) in Devine et al. The total content of 8-20% (col. 6, lines 2-7) is not the total content of "an insoluble substance" but is the content of fruit and/or vegetable juices.

Further, although Devine et al. describe that an *edible composition* can optionally comprise chunks or purees (col. 6, lines 13-18), Devine et al. do not describe that a *beverage* comprises an insoluble substance and do not describe the content of an insoluble substance.

Thus, Devine et al. (and specifically Table 1 cited by the Examiner) do not describe a beverage comprising 0.1-1.2 wt.% (or 0.1-0.9 wt.%) of an insoluble substance as claimed in present claims 1, 3, and 11.

(2) Devine et al. describe using one hydrocolloid (e.g., carrageenan, see, Table 1) in a beverage.

Devine et al. do not describe or suggest using both an acidic and a neutral polysaccharide water-soluble dietary fiber in a drink composition (as, for example, in present claims 2 and 4).

(3) Although Devine et al. disclose a long list of possible fruits and vegetables that can be used in the edible composition, Devine et al. disclose do not describe a vegetable drink (as in claims 17 and 20).

(4) Devine et al. do not describe or suggest the amount of the compound (B) and/or the compound (D) from 1.1 to 30 wt.% and the total amount of (B) and (D) of 0.5-30 wt.% (or 1.1-30 wt.%).

Devine et al. generally describe that the content of the hydrocolloid is 0.1-1.0% and that the content of 0.2 % is preferred (col. 4, lines 59-62 and Table 1).

Thus, Devine et al. do not anticipate the claimed drink.

Devine et al. do not make the claimed drink obvious.

Devine et al. do not make the claimed drink obvious because:

(a) One would not have been motivated to modify the edible composition of Devine et al. with a reasonable expectation of achieving the claimed drink comprising 0.1-1.2 wt.% of an insoluble substance having a size of 833  $\mu\text{m}$  or less because Devine et al.'s goal is to provide a more homogeneous suspension of an insoluble *fiber*, inhibiting settling of the *fiber* and preventing aggregation (col. 3, lines 30-37; col. 7, lines 47-64), while the claimed drink has (i) a reduced grassy odor and a heated odor caused by the heat sterilization and (ii) also has an enhanced savory taste which facilitates smooth drinking.

Further, there is an unlimited number of potential solutions for modifying the art drinks, wherein a result is unpredictable because the chemical arts are unpredictable.

In a recent decision, the Board stated that “[t]o the extent an art is unpredictable, as the chemical arts often are, *KSR*’s focus on these “identified, predictable solutions” may present a difficult hurdle because potential solutions are less likely to be genuinely predictable.” *Eisai Co, Ltd. v. Dr. Reddy’s Lab.*, 87 USPQ2d 1452, 533 F.3d. 1353 (Fed. Cir., 2008).

(b) The claimed combination of the insoluble substance (A), the amount of the insoluble substance, and the dietary fiber (B) (and (D)) provides an advantageous result.

Specifically, the present specification shows that when the content of the insoluble substance is higher than that claimed (e.g., 1.3 wt.%), the grassy and heated odors, a savory test, and a light feel are inferior to that of the claimed drink (see Tables 1-5 on pages 17-28 of the present specification). In addition, when the claimed dietary fibers are not used in the drink (even when the content of the insoluble substance (A) is within the claimed range), the drink still has inferior properties and taste (see Tables 4 and 5, Comparative Example 7). See Tables 1-5 attached with this paper.

(c) Optimizing the amount insoluble substance and/or the dietary fibers is not routine because the prior art must first recognize a particular parameter as a result-effect variable, i.e., that the improved grassy odor and heated odor, savory test, and a light feel is a function of the amount of insoluble substances (and fibers) (*see* pages 4-5 of the present specification). MPEP 2144.05. II, *e.g.*, *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977). Devine et al. do not recognize these dependencies. In fact, insoluble substances are not even necessarily comprised in the Devine et al.'s drink and the amount of a juice is 8-20 wt.% (col. 6, lines 1-7 and Table 1).

In a recent decision, the Board stated that while the discovery of an optimum value of a variable in a normally obvious, this is not always the case. *Ex parte Thomas*, Appeal 2007-4423 (July 23, 2008). One exception to the rule is where the parameter optimized was not recognized in the prior art as one that would affect the results. *Id.* The Examiner has to point to a teaching in the cited reference or provide any explanation based on scientific reasoning, that would support the conclusion that those skilled in the art would have considered it obvious to optimize the prior art composition to the level recited in the claims. *Id.*

Thus, Devine et al. do not make the claimed drink obvious. Applicants request that the rejection be withdrawn.

The Applicants request that the objection to claims 7-10 be withdrawn because the claims has been amended according to the Examiner's suggestions and to remove multiple dependency.

The Applicants also request that the objection to the specification be withdrawn because Applicants submit a new abstract with this paper.

A Notice of Allowance for all pending claims is requested.

Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,  
MAIER & NEUSTADT, P.C.  
Norman F. Oblon



---

Marina I. Miller, Ph.D.  
Attorney of Record  
Registration No. 59,091

Customer Number

**22850**

Tel: (703) 413-3000  
Fax: (703) 413 -2220  
(OSMMN 08/07)